CAXTON (KELANG) SDN. BHD.

v.

SUSAN JOAN LABROOY & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. F 1680 OF 1985]
12 DECEMBER 1986

LANDLORD AND TENANT: *Occupation of premises indefinitely at a monthly rental of RM300 - Premises not effectively decontrolled under the Control of Rent Act 1966 - Whether the defendants have the right to re-enter or to repossess the said premises.*

At all material times, the plaintiff occupied certain premises ("the said premises") which was and is still owned by the defendants. The defendants were the shareholders of the plaintiff company prior to 5 July 1984 but on that date the shares in the plaintiff were sold to two persons Joseph De Silva and Tan Boon Lai ("the shares agreement"). The sale was subject to a covenant by the defendants to allow the plaintiff to occupy the said premises indefinitely at a rental of RM300 per month ("Clause 6(e)").

On 14 December 1984 the defendants entered into a sale and purchase agreement with De Silva and Tan for the said premises but it was not completed because the balance purchase price was not paid within the stipulated time.

The plaintiff sought two declaratory orders namely:

(a) upon the true construction of Clause 6(e) it was entitled to occupy the said premises as a tenant at a rental of RM300 per month until the tenancy was lawfully terminated and that the defendants were estopped from contending otherwise.

(b) as long as the tenancy was in existence, the defendants have no right to re-enter or repossess the said premises other than in proceedings under the Control of Rent Act 1966.

The defendants argued that (a) failure to complete the sale and purchase agreement disentitled the plaintiff to claim a tenancy under Clause 6(e); (b) the plaintiff, not being a party to the sale of its own shares, cannot maintain this action; (c) at best the Clause 6(e) merely gave the plaintiff a licence to occupy the said premises.

Held:

[1] If it was intended that Clause 6(e) would cease to have effect if the sale of the said premises fell through, it must be clearly spelt out in the sale and purchase agreement. Such an intention cannot be imputed here.

[2] The plaintiff can maintain this action because it was not suing on the shares agreement but instead it was trying to establish a right given under the shares agreement.

[3] At all material times the plaintiff was the tenant of the said premises, and the shares agreement, in particular Clause 6(e), did not alter this status to that of a licensee.

[4] Finally, as the premises have not been effectively decontrolled under the Control of Rent Act 1966 the defendants have no right to re-enter or to repossess the said premises otherwise than pursuant of the Act.

[Judgment with costs for plaintiff.]

Legislation referred to:
Evidence Act 1950, ss. 91, 92, 115
Control of Rent Act 1966, ss. 23, 23(1)(a), (b)

Other source referred to:
Declaratory Orders, P.W. Young, 2nd Edn.

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the defendants - A.J.Dason; M/s. Dason & Co.

JUDGMENT

Siti Norma Yaakob J:

In this suit, the plaintiff, a company dealing in the business of printing press and the sale of stationeries seeks 2 declaratory orders namely

1. upon the true construction of Clause 6(e) of an agreement dated 5 July 1984, it is entitled to occupy No. 20, Jalan Station, Kelang (the premises) as a tenant of the defendants at a monthly rental of RM300, until such tenancy has been lawfully terminated and that the defendants are estopped from contending otherwise.

2. for so long as the tenancy is in existence, the defendants have no right to re-enter or repossess the premises other than in proceedings under the Control of Rent Act 1966 as the premises is rent-controlled.

The undisputed facts show that the plaintiff had been in occupation and conducting its business at the premises long befor 5 July 1984. At that time, all the shareholdings in the plaintiff were owned by the defendants and their parents but the freehold title of the premises were and are still registered in the joint names of the defendants. However, on 5 July 1984, all the 4 shareholders of the plaintiff sold their equitable interests to 2 persons namely, Joseph De Silva and Tan Boon Lai, who are also directors of the plaintiff and following this takeover, both De Silva and Tan took over absolute control and management of the plaintiff. The sale of the shares were also subject to a specific covenant on the part of the 4 vendors to allow the plaintiff to occupy the premises for an indefinite period at a normal rental of RM300 per month. (Clause 6(e)).

At the time of executing the sale and purchase agreement, the defendants as the registered owners of the freehold title of the premises granted both De Silva & Tan an option to purchase the property, to be exercised by them within a month from 20 November to 30 November 1984. Both De Silva and Tan did not exercise the option and by effluxion of time, it expired on 30 November 1984.

However, on 14 December 1984, the defendants entered into a sale and purchase agreement with De Silva and Tan whereby De Silva & Tan agreed to purchase the freehold title of the premises from the defendants for a consideration of RM285,000. As part paymnent, the 2 purchasers made a 10% down payment, the balance to be settled within 3 months from the date of the agreement. However, despite extensions given by the defendants, the sale was aborted as the purchasers were not able to meet payment of the balance of the purchase price. It is the defendants' contention that the failure on the part of the 2 purchasers to complete the purchase of the freehold title disentitles the plaintiff to claim a tenancy under Clause 6(e) of the first agreement as both the agreements were executed concurrently.

Perusing both agreements, they are easily distinguishable. The first agreement dated 5 July 1984 is for the sale of shares made between the defendants and their parents on one part and De Silva and Tan on the other. The second agreement dated 14 December 1984 is for

the sale of the freehold title of the premises and made between the defendants as the registered owners on one part and De Silva & Tan on the other. In both agreements, both De Silva and Tan are acting in their personal capacities and not as representatives of the plaintiff, a separate legal entity altogether and neither is the plaintiff a party to either agreement. There is also no mention in the second agreement that the plaintiff's tenancy as expressly declared in Clause 6(e) of the first agreement is any way to be determined in the event of the non performance of the second agreement. To that extent, I would hardly consider the 2 agreements to be in any way concurrent to each other but that they exist quite independent of each other.

If it was contemplated that the parties had intended that Clause 6(e) was inserted as an incentive for De Silva & Tan to purchase the freehold title and when the sale fell through, Clause 6(e) ceased to have any legal effect, then that common intention must be clearly spelt out in the second agreement. This is not so as the agreement does not make any reference to Clause 6(e) and I do not consider that it is proper for me to impute common intention when there is no evidence to that effect. Moreover this will be contrary to ss. 91 and 92 of the Evidence Act 1950.

Quite apart from the issue of common intention, the defendants have argued that this action is not maintainable by the plaintiff as it is not a party to the first agreement and being a stranger cannot sue on the agreement. I do not consider that this argument holds any merit as the plaintiff is not suing on the agreement as such but is trying to establish a right given to it under the agreement and to that extent, seeks a declaration that it is a tenant of the defendants. P.W. Young in his book on "*Declaratory Orders*", 2nd Edn., defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that 6 factors must be present before there can be a declaratory order. These are

1. there must exist a controversy between the parties.
2. the proceedings must involve a "right".
3. the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or *locus standi*.
4. the controversy must be subject to the Court's jurisdiction.
5. the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.
6. the issue must be ripe, i.e. it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

All these 6 conditions are met by the facts of this case and there is therefore no merit to the defendants' contention that the plaintiff's claims cannot be maintained.

The defendants have also stated that Clause 6(e) merely operates to give the plaintiff a licence to occupy the premises. To consider this I must look at the conduct of the parties before the first agreement was entered into. The defendants have never disputed that before 5 July 1984, the plaintiff was their tenant. Their own mother in an affidavit affirmed on 7 July 1986 admitted that since 28 April 1977, the plaintiff had been a tenant of the premises. There is no evidence of any written tenancy agreement drawn up between the plaintiff and the defendants and I doubt there had been one as at that time the defendants and their parents owned the plaintiff. The plaintiff had continued to be in exclusive occupation of the premises and there has been no change as to the status of the plaintiff up to the time when the first agreement was executed. The plaintiff has not surrendered the tenancy and neither have the

defendants lawfully terminated it and there is evidence that the defendants continued accepting the RM300 rentals from the plaintiff up to August this year. That being the case, Clause 6(e) has not altered the status of the plaintiff to that of a licensee. On the contrary, there is a declaration of a tenancy at RM300 rental per month, a declaration that has been acted upon by the plaintiff as it continued paying rentals at RM300 per month from the date of the first agreement, which payments have been accepted by the defendants without any reservation and by virtue of s. 115, Evidence Act 1950, the defendants are now estopped from denying otherwise. To that end, I declare that the plaintiff is entitled to occupy the premises at a rental of RM300 per month until lawfully terminated and the defendants are estopped from denying otherwise.

Lastly I come to consider the effect of the certificate of the Rent Tribunal dated 28 April, 1977, the validity of which is being questioned by the plaintiff. The certificate was issued pursuant to s. 23 of the Control of Rent Act 1966 which not only sets out the circumstances under which controlled premises can be decontrolled but also provides the procedure whereby the tenant ceases to enjoy the benefits and protection of the Act. As there were no evidence led as to the circumstances leading to the issue of the certificate, I can only go by the certificate to reach certain conclusions. On the face of it, an application dated 4 February 1977 for decontrol must have been made by the mother of the defendants as the landlady of the premises. As the tenancy in this case is a monthly tenancy, she could not possibly be taking advantage of s. 23(1)(a) of the Act which excludes monthly tenancies in which case she must be acting under s. 23(b) which envisages the situation of a tenant wishing to surrender his tenancy willingly or required by law to do so. In this case, as the plaintiff had maintained all along that it was not aware that the premises had been decontrolled, it can hardly be right to expect that it was responsible for the application to decontrol. This is so as the plaintiff does not stand to benefit from such an application. Section 23 also makes it mandatory for such a certificate to be served on the tenant as it is only upon such service that the tenant ceases to enjoy all the benefits and protection of the Act. In this case, there is no proof that the plaintiff had been served with such a certificate and that being the case, the certificate did not have the desired effect and to that extent, I hold that the premises have not been effectively decontrolled under the Act. That being the case, I declare that the defendants have no right to re-enter or repossess the premises otherwise than pursuant to the Control of Rent Act 1966.

In addition to the 2 declarations, I also make an order that the defendants pay the costs of this originating summons.

Also found at [1987] 2 CLJ 36